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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-

CHEMTRONICS, INC. AND J. RYAN NEVILLE,

Petitioners,

v.

BECKMAN INSTRUMENTS, INC. AND LELAND C. CLARK, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 14, 1970.

OPINIONS BELOW

The opinion of the District Court for the Western District of Texas (App. A1),[1] not officially reported, is unofficially reported at 160 U.S.P.Q. 619. The opinion of the Court of Appeals for the Fifth Circuit (App. A15), not yet officially reported, is unofficially reported at 165 U.S.P.Q. 355.

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[1] Such citations are to Petitioners' separate printed Appendix hereto and page therein.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 14, 1970 (App. A66). Timely petitions for rehearing and rehearing *en banc* were denied on June 19, 1970 (App. A68). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1964).

QUESTIONS PRESENTED

1. Whether the standard for determining "intentional fraud" on the Patent Office, within the meaning of *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), requires more than a determination that a patent applicant has breached his "uncompromising duty", as enunciated in *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945), by withholding or misrepresenting facts which were material to patentability?

2. Whether one sued for infringement of a patent procured by intentional fraud must make a detailed inquiry into a relevant market to establish a violation of § 2 of the Sherman Act where the patent has demonstrated its actual ability to exclude competition and affect prices?

3. Whether procurement of a patent by intentional fraud and subsequent enforcement of that patent, jointly by a patentee and his exclusive licensee pursuant to a license contract, constitutes a *per se* unreasonable restraint of trade in violation of § 1 of the Sherman Act?

STATUTORY PROVISIONS INVOLVED

Sherman Act § 1, 15 U.S.C. § 1 (1964), provides:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Sherman Act § 2, 15 U.S.C. § 2 (1964), provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

Clayton Act § 4, 15 U.S.C. § 15 (1964), provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Respondents, Leland C. Clark, Jr. and his exclusive patent licensee Beckman Instruments, Inc., sued Petitioners Chemtronics, Inc. and J. Ryan Neville for infringement of U. S. Patent 2,913,386 (the Clark patent) after about five years of dispute over whether Chemtronics should take a license. Petitioners counterclaimed for a declaratory judgment of invalidity and noninfringement and also for treble damages under § 4 of the Clayton Act for violations of §§ 1 and 2 of the Sherman Act.

The actions were properly brought before the District Court for the Western District of Texas, jurisdiction being conferred by 28 U.S.C. §§ 1337, 1338(a), 2201, and 2202 (1964).

After a trial on the issue of liability only (the issue of damages having been severed), the District Court found the Clark patent valid but not infringed and dismissed Petitioners' antitrust counterclaim. All parties appealed.

The Court of Appeals for the Fifth Circuit found the Clark patent "invalid for two independent reasons" (App. A23), namely, for anticipation by the prior art and for fraud in procurement. Nevertheless, the Court of Appeals remanded the case to determine whether Respondents indulged in knowing, willful misrepresentation of material facts, have market power in some relevant market, have used that power unlawfully, and have directly caused Petitioners to suffer damage; and to allow Petitioners to develop the claim under § 1 of the Sherman Act.

A. The Matter of Patent Validity Is Not Involved in This Petition

The Clark patent is invalid for anticipation by the prior art as held by the Court of Appeals. Hence, the technological details of the Clark patent and the prior art need not be presented for the purposes of this Petition.

B. Background of the Case

In October of 1956, while a patent application filed by Clark relating to an electrochemical measuring device was pending in the Patent Office, Respondents Clark and Beckman entered into an agreement whereby Clark granted Beckman an exclusive license under his application and resulting patent. However, in 1954, prior to Clark's alleged invention, one Dr. Richard Stow of Ohio State University had communicated to Beckman a description of a prior art device which Stow had devised. Beckman, a large analytical instrument manufacturer, collaborated with Stow on various designs of his device. This Stow prior art was the art which anticipated the Clark patent and rendered it invalid.

After consummation of the license agreement between Beckman and Clark, Respondents jointly undertook to prosecute the Clark application before the Patent Office. At

that time, when Beckman was effecting transfer of the application to its own choice of patent law firms, one Allen Strickler, a Beckman patent engineer in charge of the Clark application, pointedly called the attention of Beckman management to the Stow prior art in a "confidential" intracorporate letter about three years before the Clark patent issued. The letter reads in part[2] as follows:

> A related matter has now come up that creates a rather ticklish situation. As of early 1954, Dr. Richard W. Stow of the Ohio State University Medical Center corresponded with our [Beckman's] Sales Department . . . concerning a glass electrode adaptation that he was developing for pCO_2 measurement . . . . The electrode is similar to the Clark design in that the reference and measuring electrode are both placed behind a single semi-permeable membrane. *The Stow device clearly is within the scope of claims now in the Clark application.* It happens further that Clark and Stow have known about each other's work . . . . [Emphasis added.]

At the time, Mr. Strickler was functioning as the liaison between Beckman's outside patent law firm and management as he had been doing for about five years. He remained actively involved in the prosecution of the Clark application through the Patent Office. Mr. Strickler is still employed by Beckman.

The Court of Appeals noted the upshot of Strickler's letter:

> Upon learning of this possible preemption of its newly acquired rights, Beckman quickly contacted Stow and attempted to purchase his invention as a protective measure. Stow replied, however, that his invention had been dedicated to the public . . . . [App. A37.]

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[2] The full text of the letter is reproduced in the separate Appendix hereto (App. A70).

Despite the recognition of its preemptory significance, the Stow prior art was not called to the attention of the Patent Office. At no time have Respondents presented evidence which would tend to establish their "good faith" or "honest mistake" in withholding the Stow prior art. The Court of Appeals observed the absence of such evidence:

> There is no indication that the omission was caused by oversight . . . . [App. A34.]

> [Respondents'] only reply to these facts is that they did not consider Stow's work to be relevant prior art. This assertion, however, is rendered *utterly incredible* both by Beckman's conduct and by the obvious similarities of the Stow and Clark devices . . . . [W]e conclude that there was *no excuse* for [Respondents'] failure to disclose Stow's work to the Patent Office . . . . [Emphasis added; App. A38.]

During prosecution of the application, Clark collaborated with Beckman regarding responses to Patent Office rejections, and he composed arguments to be directed to the Examiner. The papers filed in the Patent Office, in argument for patentability, emphasized aspects of Clark's alleged invention which were clearly shown in the Stow prior art. Thus, the Court of Appeals noted:

> . . . [Respondents] not only failed to present the Stow device to the Patent Office, but also made affirmative representation in the papers they filed to the effect that there had been no previous invention displaying the properties that the Clark device had in common with the Stow device.[22]

> [22] [Court's footnote.] For example, in a paper filed with the Patent Office during the pendency of the application, [Respondents] represented that "*The Clark instrument is the only one which can measure the partial pressure of a gas in a fluid regardless of the composition of the fluid.*" [Emphasis in original papers filed in the Patent Office.] . . . . The Stow invention also has this capability. There are a number of similarly misleading representations throughout the papers filed by [Respondents] . . . . [App. A37-A38.]

In November of 1956, contemporaneously with the "ticklish situation" letter, Beckman began sublicensing under the Clark application. In 1967 there were seventeen sublicensees paying 15% royalties. One of those sublicensees had been sued under the Clark patent, 785 O.G. Pat. Off. 1143 (1962). Beckman had received over $200,000 in royalty payments as of 1967, and through 1966 Beckman's sales of devices sheltered by the Clark patent almost equaled the total of the corresponding sales by the sublicensees.

Uncontroverted evidence was received that the devices alleged by Respondents to have been covered by the Clark patent are essentially the only portable devices available to continuously monitor oxygen content of a moving stream in many fields of utility and constitute in themselves a definable and relevant market.

Petitioner Chemtronics is a small instrument manufacturer whose basic product line at the time of filing this suit comprised devices alleged to infringe the Clark patent. Those devices were independently developed by Petitioner Neville who holds a Ph.D. in physiology.

Chemtronics' total sales were about $25,000 the year the suit was brought but suffered a 40% decrease after the suit was filed. Currently, Chemtronics' business is virtually dormant, pending the outcome of this suit. Indeed, the most graphic evidence of the damage sustained by Chemtronics is this suit itself.

REASONS FOR GRANTING CERTIORARI

A. The Law of Fraudulent Procurement of Patents Requires Supreme Court Attention

The Court of Appeals found Respondents had breached their duty to disclose the Stow prior art to the Patent Office. Despite this, the case was remanded for proceedings to determine "whether [Respondents] indulged in knowing, willful misrepresentation of material facts" (App. A41). But the Court of Appeals did not define what more than breach of this duty by conscious act might be required to establish that Respondent's conduct was "knowing and willful", i.e., was "intentional fraud" with the meaning of *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), which could support an antitrust claim.

This case involves matters of great public importance relating to the implementation of private antitrust remedies (unimplemented to now) against the maintenance and enforcement of a patent obtained by intentional fraud on the Patent Office. This Court held such conduct may be violative of the antitrust laws in the *Walker* case.

> A cursory survey of the decisions of the Federal Courts reported for the years 1960 through 1968 in which the issue of fraud on the Patent Office was directly pleaded by Defendants shows that about forty (40) decisions expressly discuss and decide the fraud issue. It is significant that thirty of those forty cases came after 1965 when the *Walker* case was decided.[3]

Since 1968, the issue of fraudulent procurement of a patent has been raised before the courts with increasing frequency.

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[3] Cochran, *Historical Review of Fraud in Patent Procurement: The Standards and Procedures for Doing Business Before the Patent Office*, 52 J.Pat.Off.Soc'y 71 (1970). Mr. Cochran is currently the Solicitor of the United States Patent Office.

However, courts approach the issue of fraudulent procurement with distaste and demonstrate a natural reluctance to find culpable fraud, generating the observation that "where an antitrust violation has been alleged for fraudulent procurement, the courts have demanded a particularly high 'degree' of fraud."[4]

1. *The Standard of Conduct for Patent Applicants Is Well Established.*

In 1945, this Court set forth the standard of conduct to be observed by applicants before the Patent Office in *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945), wherein it was held:

> Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue. [Citation omitted.] This duty is not excused by reasonable doubts as to the sufficiency of the proof of the inequitable conduct nor by resort to independent legal advice. Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence.

The standard has been restated recently in *Charles Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574, 579 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969):

> Pfizer and Cyanamid, like all applicants, stood before the Patent Office in a confidential relationship and owed the obligation of frank and truthful statements

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[4] *Patents, Fraud and the Antitrust Laws*, 37 Geo. Wash. L. Rev. 168, 173 (1968), in 1 Patent Law Review 228, 235 (Costner ed. 1969).

and in *Corning Glass Works* v. *Anchor Hocking Glass Corp.*, 253 F. Supp. 461, 470 (D. Del. 1966), *rev'd on other grounds*, 374 F.2d 473 (3rd Cir. 1967), *cert. denied*, 389 U.S. 826 (1967):

> Absolute honesty and good faith disclosure is necessary.

In the present case, the Court of Appeals recognized and applied the standard enunciated in the *Précision Instrument* case and held that the District Court either applied the wrong legal standard in ruling absence of fraud or that the finding was clearly erroneous. The Court of Appeals said:

> We are left with the "definite and firm conviction" that [Respondents'] conduct did not measure up to the legal standard. [App. A36.]

The Court of Appeals terms Respondents' contentions that they considered the Stow prior art irrelevant to be "utterly incredible" (App. A38).

Despite these premises that Respondents' conduct was in dereliction of the established standard for patent applicants, and that by such dereliction Respondents obtained the Clark patent,[5] the Court of Appeals remanded Petitioners to inquire into "the knowing and willful" nature of the misrepresentations in order to support their antitrust claims. But there has been no definitive standard articulated by this or any other Court as to *what evidence*

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[5] Since *Walker*, the District Court in *Corning Glass Works* v. *Anchor Hocking Glass Corp.*, *supra*, has held "[n]ot only must defendant establish . . . an intentional misrepresentation . . . to the patent examiner but also . . . that it was material, i.e., the patent would not have issued but for the fraud." 253 F. Supp. at 469. *Cf. Corona Cord Tire Co.* v. *Doran Chemical Corp.*, 276 U.S. 358 (1928).

of what type should be elicited to establish the required degree of "knowledge" or "willfulness", i.e., the degree of intent.

2. *Judicial Confusion in Determining Fraudulent Patent Procurement.*

Ten years ago, it was recognized that there existed no definitive standards to determine the "fraudulent" quality of a patent applicant's conduct before the Patent Office:

> The most authoritative source for determining what conduct the Supreme Court intended to be included within the meaning of fraud should be the opinions in the *Hazel Atlas* [322 U.S. 238 (1944)] and *Precision Instrument* cases, but neither opinion discusses in detail what conduct before the Patent Office is fraudulent. In the *Hazel Atlas* case the term "fraud" was used as if it were established, without a discussion of the facts which gave rise to the finding . . . . Although the opinion in the *Precision Instrument* case did indicate that knowledge is an element of fraud, there was still no definitive standard that could be used to evaluate a patentee's misconduct before the Patent Office.[6]

Without guidelines from this Court, lower courts are still grappling with the problem with uneven result. A graphic example is furnished by two decisions this year:

> One District Court held representations in an affidavit before the Patent Office constituted fraud and invalidated the patent for fraud in *Monsanto Co.* v. *Rohm & Haas Co.*, 312 F.Supp. 778 (E.D. Pa. 1970), while another District Court held the same patent valid and viewed the same affidavit as applicants "putting their best foot forward" in *Monsanto Co.* v. *Dawson Chemical Co.*, not yet officially reported, 165 U.S.P.Q. 560, 568 (S.D. Tex. 1970).

[6] *Fraud in the Procurement of a Patent*, 29 Geo. Wash. L. Rev. 110, 123-25 (1960).

3. *When Does It Become Incumbent Upon the Patentee to Establish His Good Faith or Honest Mistake?*

A trial on the fraud issue has been had, and not one shred of evidence as to Respondents' "good faith" or "honest mistake" has been offered. These are the available defenses to fraudulent procurement as outlined in *Walker*, 382 U.S. at 177. However, these defenses have not even been advanced in this case though the burden to do so was clearly on Respondents. Note, for example, 37 C.J.S. *Fraud* § 94, at 401 (1943):

> Although no one is bound to disprove fraud until it be proved by either direct or circumstantial evidence, where the proof creates an unavoidable inference of fraud the burden of going forward with evidence is on the party charged. . . . [Footnotes omitted.]

A detailed inquiry into the issue of "willfulness" should not be required here — intent is an element of evidence to prove a fraudulent act only between parties dealing at arm's length. When parties stand in a relation of trust and confidence with respect to one another, a different standard is invoked, 37 C.J.S. *Fraud* § 16, at 247 (1943):

> No general rule can be formulated which will fix under all circumstances the existence of a relation of trust and confidence because of which one party to a transaction has a right to a full disclosure of all material facts from the other. However, where such a relation may be regarded as existing between the parties, *there* is a duty to disclose all material facts, and failure to do so constitutes fraud. [Footnotes omitted.]

To this extent, the culpable nature of the fraud by Respondents has already been clearly established.

If to establish fraudulent procurement within the meaning of *Walker* it becomes incumbent upon an alleged in-

fringer to prove "malice" or to positively establish "bad faith", *Walker* has been emasculated of any antitrust deterrent effect. Former Commissioner of Patents David Ladd commented on a "bad faith" test to determine liability of a patentee who attempts to exclude competition by harassing patent litigation:

> But to make bad faith the criterion is of little help. Barring some incredibly improbable admission against interest or an unlikely disclosure during discovery, a patent owner will seldom be convicted of bad faith from his own mouth. As in any other proof of intent, the courts must nearly always look to circumstantial evidence.
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> . . . .
>
> . . . From these cases it is difficult to escape the conclusion that as long as bad faith is an essential element of proof, business aggression [by patentees] can be controlled through private remedies only in a very limited number of cases.[7]

Petitioners submit that such an incredibly improbable admission exists in the "ticklish situation" letter. Yet, even in view of that, Petitioners are remanded to inquire further into intent.

In its Petition for Rehearing before the Court of Appeals, Respondent Beckman boldly asserted that "there was no duty to disclose Stow to the Patent Office" *and went on to* suggest that "no such practice existed when the Clark application was before the Patent Office."

If that argument can be made, twenty-five years after the *Precision Instrument* case, and five years after *Walker*,

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[7] Ladd, *Business Aggression Under the Patent System*, 26 U. of Chi. L. Rev. 353, 369-72 (1959). Mr. Ladd authored the article before becoming Commissioner of Patents.

the law of fraudulent procurement of patents is in dire need of attention from this Court.

B. An Antitrust Remedy Against Exercise of a Patent Obtained by Intentional Fraud Must Be Reasonably and Economically Accessible

The Court of Appeals remanded this case for further proceedings to determine "whether . . . as regards monopolization, [Respondents] have market power in some relevant market, whether they have used this power unlawfully, and whether they have directly caused [Petitioners] to suffer damage" (App. A41) and for Petitioners to "develop" their antitrust claim under Section 1 of the Sherman Act.

The two points mentioned by the Court of Appeals regarding Respondents' unlawful use of their improperly acquired power and the existence of damage to Petitioners, are foregone conclusions when a patentee forces a defendant through the expense of an infringement suit on a patent procured by intentional fraud. *Dairy Foods, Inc.* v. *Dairy Maid Products Cooperative*, 297 F.2d 805, 809 (7th Cir. 1961).

Though the Court of Appeals noted that some of Petitioners' evidence was improperly excluded, uncontroverted evidence establishing a relevant market was received. But the question remains as to how extensive a market inquiry need be made in cases of enforcement of a patent procured by intentional fraud.

The *Walker* case suggested that a relevant market inquiry may be essential to establishment of a Section 2 violation based on fraudulent procurement of a patent. This Court at that time was reviewing the dismissal prior to trial, of an antitrust claim on grounds that the patent provided antitrust immunity. In that circumstance, without

any evidence in the record, the Court declined to define a new area of *per se* illegality and commented, 382 U.S. at 178:

> We are reluctant to extend [the area of *per se* illegality] on the bare pleadings and absent examination of market effect and economic consequences.

By contrast, this Court has often equated a patent to a monopoly. *United States* v. *American Bell Telephone Co.*, 167 U.S. 809 (1897); *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U.S. 405 (1908); *Crown Die and Tool Co.* v. *Nye Tool and Machine Works*, 261 U.S. 24 (1923). This Court has also recognized in tying cases that requisite economic power in the tying product can be presumed when it is patented. *United States* v. *Loew's Inc.*, 371 U.S. 38, 45 (1962).

Notwithstanding *Walker's* language with respect to potential necessity for relevant market inquiry in a Section 2 case, under Section 1 a contract or combination to fraudulently procure and enforce a patent has been suggested as being a *per se* violation. In a concurring opinion in *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 200 (1963), Mr. Justice White stated:

> Whatever may be the duty of a single party to draw the prior art to the [Patent] Office's attention, see 35 U.S.C. 115 . . . clearly collusion among applicants to prevent prior art from coming to or being drawn to the Office's attention is an inequitable imposition on the Office and on the public. [Citations omitted.] In my view, such collusion to secure a monopoly grant runs afoul of the Sherman Act's prohibitions against conspiracies in restraint of trade — if not bad *per se*, then such agreements are at least presumptively bad.

The manifest suggestion of those words is that the *mere acquisition* of any type of patent position by multiple parties through intentional fraud on the Patent Office is a

practice which "because of its pernicious effect on competition and lack of any redeeming virtue [is] conclusively presumed to be unreasonable and therefore illegal . . . ." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958).

The anticompetitive effects of actually enforcing a fraudulently procured patent are axiomatic. If those anticompetitive effects are permitted to be obscured behind an economic smokescreen of detailed relevant market inquiry, the antitrust sanctions against fraudulent patent monopolies will seldom be exercised, particularly in the private antitrust arena.

The expense of patent litigation is already horrendously high. In 1950, Mr. Joseph Borkin, Assistant to the Attorney General, wrote:

> At the outset of patent litigation, an element is introduced which has nothing to do with the merit of contesting claims but which controls the ability to endure trial. This element is economic strength.[8]

To superimpose upon this burden the additional burden of conducting "an incredibly complicated and prolonged economic investigation into the entire history of the industry involved as well as related industries"[9] would virtually insulate a patentee with a fraudulently procured patent from private antitrust prosecution. The alleged infringer in such a litigation would be confronted with the prospect of doubling the trial expense or, if the antitrust issues are severed, awaiting the patentee's exhaustion of a long appeal route on the fraud issue. When the patent litigation

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[8] Borkin, *The Patent Infringement Suit — Ordeal by Trial*, 17 U. of Chi. L. Rev. 634, 635 (1950).

[9] *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958).

is directed against the small competitor, he is hard pressed to survive the patent litigation, let alone the expense of a complex judicial market analysis.

This Court has granted certiorari when the effectiveness of the private action as a vital means for enforcing the antitrust laws seems threatened. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 136 (1968).

1. *When a Patent Has Been Obtained by Intentional Fraud, Any Market Power Accruing to the Patentee Must Not be Condoned.*

A recent case considered an instance where an antitrust defendant had violated the Mineral Leasing Act by illegally operating a pipeline as a private carrier. In *Denver Petroleum Corp.* v. *Shell Oil Co.*, 306 F.Supp. 289, 304 (D. Col. 1969), the Court found the relevant geographic market limited to a single county in Colorado and commented:

> Defendant would have us engage in market analysis considering the full breadth of 'economic and competitive' realities . . . . But when, with an illegal practice such as present here in mind, one can look at an area and see the existence of monopoly power, not by inference from market share, but by determining actual ability to exclude competition and control prices, there appears no real need to go further.

The relevant market concept was developed to give a court a frame of reference to "look" for monopoly in conduct otherwise legal. Such a frame of reference only distorts the perspective if the subject of study is a fraudulently procured patent — an *illegal* monopoly by definition — which has demonstrated actual power to tax competition with a significant royalty under threat of exclusion by suit.

Monoply power under Section 2 of the Sherman Act is measured by ability to exclude competition or fix or control prices in a relevant market.

Patent litigation is by definition an intentional attempt to exclude competition or control the price within the patent monopoly since the patentee invariably seeks an injunction to exclude the alleged infringer or to place the patentee in a position to demand royalty. Hence, in the microcosm of the courtroom where the patentee seeks to enforce a fraudulently procured patent, all the elements of a Section 2 violation are present.

To the alleged infringer fighting for his business life, the relevant market outside that courtroom is wholly immaterial, and concepts of "cross-elasticity" of demand are irrelevant. In that courtroom, the alleged infringer is likely looking down the gun barrel of the biggest monopoly or attempt to monopolize he has ever seen. When that same gun barrel has been leveled at other competitors for purposes of excluding them or exacting from them unjustified royalty tribute, the violation of Section 2 *must* be deemed to exist.

When two parties combine to acquire and enforce a fraudulently procured patent, the constitutional purpose of the patent system has been subverted to become a tool of raw business aggression to restrain competition by the alleged infringer and by others who take heed of the suit. Such a practice is utterly unconscionable and cannot stand the Section 1 test of reasonableness in any forum.

To recite such a practice is to condemn it.

CONCLUSION

The remedy of the *Walker* case remains unimplemented after five years. Although it has been long recognized that unscrupulous patent holders can use patents to commit business aggression,[10] the antitrust remedy provided by *Walker* has been sterilized by judicial demands for extensive economic inquiry and for virtual confession of fraudulent intent.

To breathe life into *Walker*, a realistic look at the actual effect which a fraudulently procured patent can have on *competitors* is required.

For these reasons, a writ of certiorari should issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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[10] Ladd, *Business Aggression Under the Patent System*, *supra*, n. 7; Borkin, *The Patent Infringement Suit — Ordeal by Trial*, *supra*, n. 8.